

Noah Feldman's "Cosmopolitan Law."

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This is a response to a piece by Noah Feldman in the online [Yale Law Journal](http://yalelawjournal.org).¹

Noah Feldman's elegant essay contains many attractive suggestions, especially in its final compelling discussions of various conceptions of Cosmopolitan Law. Less importantly for your purposes, dear Reader, than for mine, it also provides a fair and clear account of some of my own discussions of cosmopolitanism (in the course of which I have made a few suggestions that may be of relevance for the law). In this brief response, I should like to focus on clarifying one of the conceptual distinctions that I have made: the distinction between the rational and the reasonable. In marking that distinction, I was returning to a contrast I had made many years ago, in *In My Father's House: Africa in the Philosophy of Culture*. Reading Feldman's response, I realize that I had been a good deal too economical in explaining what I had in mind.

Clarifying my view will also help to reinforce an important distinction, which Feldman both accepts and rightly finds stressed in my own work, between the context of our cosmopolitan obligations, on the one hand, and our political obligations, on the other. That is a central theme of his essay, of course; and in clarifying my view, I hope to clarify, as well, how my "reined-in" account of cosmopolitanism might relate to some of the legal and political exigencies he explores.

What distinction do I mark by using the two words "rational" and "reasonable," words that many people would treat as synonyms? I should say, first, that I take both terms to apply both to ways of thinking about what to believe—epistemic reasoning—and to ways of thinking about what to do—practical reasoning. (I think that feelings can be reasonable and unreasonable, too, but this is a complication I shall ignore here.) At a first pass, the distinction I have in mind is between epistemic and practical procedures that are likely to be successful, given the way the world is (which I call "rational"); and procedures that a normal human being has no reason to doubt will be effective, whether or not, in fact, they are (which I call "reasonable"). If you thought that there were many invisible spirits in the world, who could advance your causes if you conformed to rules they had laid down, and if you thought "Avoid eating bush meat" was one of those rules, it would be reasonable to avoid eating bush meat. It would not be rational to do so, because there are no such spirits. And so, *ceteris paribus*, for someone who knows that there are no such spirits, it is not reasonable to act in this way. For such a person already possesses the materials to see that this practice will not succeed.

That is a case of practical rationality and reasonableness. Could a person reasonably believe the world was full of such spirits? I think so, though this is a matter on which people might differ. But I don't think that it is rational to believe in them. The procedures that lead people to make the judgment that there are invisible spirits are, by and large, unreliable. (This, too, of course, is a matter on which there might well be controversy; and, since rationality connects with reliability, which comes by degrees, one controversy will be how much reliability we need.)

The distinction sketched here is one of a family of distinctions between what are now called "internalist" and "externalist" understandings of justification. So, on some conceptions of epistemic justification (Descartes', for example), the question of whether you

¹ http://yalelawjournal.org/116/5/1022_feldman.html

are justified in believing that, say, there's a rabbit over there can be settled purely by reference to events and processes internal to your own mental life. On many recent conceptions, by contrast, you are justified in believing something just in case the mechanism by which you came to the belief is one that is reliable in the circumstances: and whether a mechanism is reliable generally depends on matters external to the mind of the believer. In a world with rabbits but no hares, a quick glance will be a reliable way of deciding if there's a rabbit around; in the actual world, it requires as well a capacity to discriminate the appearances of hares and rabbits. On externalist views, the question of whether people's beliefs are justified, depending as it does on things outside, is not generally under their control. You can have justificatory bad luck.

Now the contexts in which I mobilized this distinction across the two books Feldman was discussing had to do with attitudes to the views of people whom one took to be deeply mistaken about some feature of the world relevant to practical decision. In *The Ethics of Identity*, these were those Jehovah's Witnesses (crucially, by no means all of them) who believe that blood transfusions are sinful. I pointed out that if the law permits transfusions on the unconscious, it will allow transfusions on these people and, in so doing, will do to them something they abhor. And I said that, since there must be some rule, and the rule permitting transfusions on the unconscious without their consent was preferable for reasons that had nothing to do with the fact that the people it disadvantages were Witnesses, they could not complain that the state, in making such a law, was failing to observe the principle of neutrality as equal respect.

It was in this context that I observed that many people think the Witnesses who take this view unreasonable. (I did not say "irrational," because, in my usage, that would be too obvious to be worth saying: having an involuntary blood transfusion does not risk eternal damnation, so acting as if it does is not the road to success.) One reason to think that they might be unreasonable is that—so a significant minority of Witnesses now argue—the passages in Leviticus that are supposed to warrant this claim cannot responsibly be interpreted as doing so. This substantive claim could be mistaken, but if it is true, then these anti-blood-transfusion Witnesses are mistaken not because they have justificatory bad luck but because they are using procedures of justification that they already possess the means to recognize as unfounded. The problem is internal to their system of thought; it is not in the external relations of their understanding to reality. Now I do not, in fact, hold the view that, in Feldman's gloss, these Witnesses are "nonetheless being respected equally" because "their belief is false (and irrational)." As I said in the book,

Under neutrality as equal respect, Jehovah's Witnesses will also sometimes be coerced into doing what we think is best for them, even though, because their beliefs are unreasonable, they think we are doing them great harm: but we will be thwarting their wills for some good reason, having reflected on whether we could adopt a policy that did not thwart their aims, and so the fact that they are Witnesses does not explain why we went against their aims.

I could have said—and I probably should have, since it would have avoided a natural misunderstanding—that their unreasonableness isn't the explanation of why we went against their aims either. That most of us don't believe that there is a risk of eternal damnation on these grounds matters not because these Witnesses hold an irrational view (though they do) but because we cannot adopt a policy here that is indifferent as to whether it is we or the Witnesses who are right.

And it is this fact that arises as a consequence of our having political and not merely cosmopolitan obligations to them. We live under the same law. Laws have factual and

normative presuppositions, some of which are controversial in our society. As a result, we must sometimes act as if some of our fellow citizens are mistaken. I argued that we should avoid this if we can, in cases where the beliefs we do not share are particularly central to those of fellow citizens, but that if we could not avoid it, we could rightly claim not to have treated them with disrespect.

In the cosmopolitan context, by contrast, which is where I discussed various theories of disease, we are not usually obliged to make a common binding rule. In sharing the world when we do not share a state, we do not have to coerce people on the basis of rules, rules that may sometimes presuppose these strangers are wrong about the world. Here the recognition of the reasonableness of the stranger is helpful, because it prepares us for the reality that, however clever we both are, agreement is not likely to come because we converse together. And the reason is that reaching agreement will often require that we are plugged into the external world in the same way—that we share rationality—and not that we merely have the shared capacity for reasonableness, a capacity that strangers are no less likely to have than we are, but whose possession is consistent with very different ways of being plugged into the world. In particular, one of the features of our circumstances that affects what it is reasonable to believe is what we are taught by those who love and raise us. And that differs significantly both across and within societies.

So Feldman is right that the attitude of respect for minorities that I endorse may leave them legally coerced: I believe (and I argued) that that is unavoidable. Feldman, however, thinks that there is another cosmopolitan possibility:

... we might conclude that the state should treat equally all conceptions of the world that are in this sense reasonable. If that were so, we could not so cavalierly dismiss the Witnesses' belief as false, and we could not so easily justify coercing them through the force of law. Cosmopolitanism of this sort ... might lead us to the conclusion that the state in fact cannot coerce people who reject the grounds for coercion.

This proposal (which Feldman does not, of course, endorse) can actually be rejected as unattractively un-cosmopolitan. First, we should recall that it is people and not conceptions that are entitled to respect on the cosmopolitan view. Recall, too, that in my account, the state could not avoid coercion in this case because the beliefs of the minority and the beliefs of the majority made different policies reasonable and we could not craft exceptions that would achieve our (reasonable) aims. If there had been a policy that didn't coerce them against their false and even unreasonable belief, it would have been preferable. I believe that conscious, sane, uncoerced, Witnesses have the right to choose to die because they do not want blood transfusions. Feldman writes, "Their particularity—in the sense of the ideas they 'already have'—is what makes their views reasonable; yet the state must ignore this particularity to fulfill its moral duty of neutrality." But a state that takes account of a group's ideas, ideals, and commitments without deferring to them has not, thereby, "ignored" them. Equal respect is demanding, even when we cannot give everyone what they want.

Towards the end of Chapter 5 of *Cosmopolitanism* I pointed out that when we are implementing international human rights treaties we are essentially bringing political obligation to bear in a global context. Once that is the situation, we face exactly the same problem with the stranger from outside our state that we face with the stranger within. Once we live under the same law, we will come to see that laws sometimes have controversial factual and normative presuppositions; and so, as with our fellow nationals, we will sometimes have to act as if some of our fellow citizens of the world are mistaken. I believe that the concern for neutrality as equal respect that governs liberal lawmaking is also a

desideratum in the—more limited but, probably also more demanding—context that is created when the political community and the human community are one.